



Confederated Tribes and Bands
of the Yakama Nation

Established by the
Treaty of June 9, 1855

July 26, 2024

Marla Koberstein
Washington Department of Ecology
Water Quality Program
P.O. Bo 47696
Olympia, WA 98504-7696

TRANSMITTAL VIA ELECTRONIC MAIL

Re: Proposed Updates to the Washington Water Quality Standards for Natural Conditions Provisions in WAC Chapter 173-201A

Dear Ms. Koberstein,

The Confederated Tribes and Bands of the Yakama Nation (Yakama Nation) submits the following comments regarding Ecology's proposed updates to the Washington Water Quality Standards for Natural Conditions Provisions in WAC Chapter 173-201A.

The Yakama Nation is a sovereign and original Native Nation federally-recognized under the Treaty with the Yakamas, U.S. – Yakama Nation, June 9, 1855 ("Treaty of 1855"). The Yakama Nation's history and culture, as well as the lives of our People, are intertwined with Nch'i-Wa'na (the Columbia River) and the salmon, fish, plants, and animals that rely on its waters. The Yakama Nation has reserved rights in these resources pursuant to Article III of the Treaty of 1855. Protecting the waters of the Columbia River and its tributaries is therefore critical to the protection of our Treaty-reserved resources and rights, and ultimately to the health and welfare of our communities.

Yakama Nation is concerned about proposed changes to the Water Quality Standards that may negatively affect ESA-listed and treaty-protected species and resources. The goal of our engagement in Water Quality Standards and processes such as these is to ensure compliance with the Clean Water Act (CWA) and protection of ESA-listed species and our Treaty-reserved resources.

Background Summary

The Yakama Nation's understanding is that with this proposed change, Ecology will allow a process for separate and individual models to determine "natural conditions" for site specific freshwater and marine waters across Washington State. These models will be designed and conducted with the development of individual Quality Assurance Project Plans (QAPPs) which would ultimately provide the basis for developing natural conditions

criteria for Total Maximum Daily Loads (TMDLs) to override existing, biologically-based numeric criteria with levels of temperature and dissolved oxygen that exist in current conditions or have been modeled to predict historical natural conditions.

In addition to Ecology's proposed update, in 2020, the EPA issued a Columbia River temperature TMDL. According to EPA's webpage: *The TMDL is required under the federal Clean Water Act because significant portions of the Columbia and lower Snake Rivers are identified by the states of Washington and Oregon as impaired due to temperatures that exceed the numeric criteria portion of the states' water quality standards at various locations and times of year.* Section 401 of the CWA empowers Ecology to implement TMDL requirements as binding conditions of its CWA certifications.

General Comments

Many of the temperature and dissolved oxygen levels present in our waters today have lethal and sublethal effects on salmonids and other aquatic species, particularly in the Columbia River Basin. With climate change, these lethal and sublethal temperatures are predicted to increase.

Across the Columbia River Basin, temperature and dissolved oxygen issues are further compounded by dams. Dams restrict natural processes and raise water temperatures which negatively impact, and at times are lethal to adult and juvenile salmonids. These temperature impacts are not minimal and in fact are a major reason Columbia River Basin salmonid are in peril. These high water temperatures are so hot at times that they impede salmonid migration and increase stress, disease, and mortality. When these impacts are combined with projected climate change effects, there is significant potential for harm to Treaty-reserved salmon populations. The states seem to be cognizant of this fact. In 1994, Washington State listed the Columbia River as impaired due to high temperatures. Both Washington State and Oregon State requested the EPA issue a Columbia River temperature TMDL over twenty years ago.

Ecology's proposed process to model and identify historical natural temperatures is a simplistic approach that does not adequately take into consideration the complex and diverse habitats that historically existed prior to major alterations at the reach, watershed, and landscape scale. Historically, cold water refuge was provided through diverse complex instream habitat, groundwater upwelling, hyporheic connection, floodplain connectivity, beaver dams, and robust riparian and forested areas providing shade and large wood for cover and respite from seasonally heated waters. These habitats and cold water refuges provide critical habitat for all life history stages of salmonids and other aquatic species. Today, these types of habitats rarely exist in our watersheds and are the focus of billions of dollars in restoration efforts.

It is concerning, that nowhere in the documents reviewed does Ecology set a limit for how high these natural temperatures could be set. Additionally, it is not clear what mitigation efforts, such as restoring riparian buffers in these site-specific areas, will be required. Based on the documents provided and the process proposed by Ecology, it is unclear if this

proposed process would result in even higher temperature levels based on modeled natural conditions being used as criteria for TMDLs. Additionally, it is unclear if this proposed change will include Endangered Species Act (ESA) Section 7 consultation with the National Oceanic Atmospheric Administration Fisheries and U.S. Fish and Wildlife Service.

This is an inadequate and confusing approach that will result in disjointed and separate permit conditions, monitoring, mitigation measures, and reporting across critical habitats for ESA-listed and treaty protected resources. There is little to no assurance that this proposed change and process will protect aquatic resources.

Government-to-Government Consultation

According to Ecology's webpage for NCC, this proposed change has been in development since September 2022. The webpage reports that a series of public hearings were held but it is unclear what actions were taken to conduct consultation with Tribes. This is a complicated process with little to no opportunity for the Yakama Nation to provide sufficient oversight to protect our Treaty-reserved resources. Ecology's review process appears to be rushed and compartmentalized and has not allowed time for meaningful consultation and input from the Yakama Nation. As a result, there is a potential that unknown and negative impacts to water quality and Treaty-reserved resources will continue throughout the Columbia River Basin.

Official government-to-government consultation with the Yakama Nation must take place between the Yakama Nation Tribal Council and the decision-maker from the agency proposing an action. However, before the Yakama Nation can assess and consider the key elements of an action through consultation, a staff-level technical briefing is required to discuss the action.

Unfortunately, it appears there is not sufficient time to schedule and conduct a staff-level technical meeting. Yakama Nation staff will therefore be unable to fully brief the Yakama Nation Tribal Council in a manner that allows the Council members to make an informed decision regarding consultation. Consequently, under the current schedule, there will be no meaningful consultation opportunity for the Yakama Nation Tribal Council to weigh in on impacts to Treaty-reserved resources.

Without adequate consultation, the Yakama Nation is concerned that impacts to our Treaty-reserved resources will not be sufficiently evaluated and addressed.

Conclusion

Ecology's proposed updates to the Washington Water Quality Standards for Natural Conditions Provisions in WAC Chapter 173-201A have the potential to affect ESA-listed and Treaty-reserved resources. As such, the concerns described in these comments are of great importance to the Yakama Nation and deserve meaningful consultation.

If you have any questions or concerns regarding this comment, please contact Ms. Shannon Adams, Yakama Nation Fisheries Technical Lead Coordinator, at (509) 865-5121 ext. 6371.

YAKAMA NATION COMMENTS ON PROPOSED UPDATES TO THE WASHINGTON WATER QUALITY STANDARDS FOR
NATURAL CONDITIONS PROVISIONS IN WAC CHAPTER 173-201A
JULY 26, 2024

Respectfully,



Phil Rigdon, Superintendent
Department of Natural Resources